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No. 82-699

In The

Supreme Court of the United States

October Term, 1982

Champion Products, Inc.
Petitioner

v.

University of Pittsburgh
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF UNIVERSITY OF PITTSBURGH IN OPPOSITION TO THE PETITION

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TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	1
Respondent's Grounds of Opposition to the Petition	2
Counterstatement of the Case	3
I. The Court of Appeals Correctly Decided The Issue Before It	6
II. There Is Nothing About This Case Which Calls For Review By This Court	7
Conclusion	8

TABLE OF AUTHORITIES

CASES	PAGE
Czaplicki v. The Hoegh Silvercloud, (1956) 351 U.S. 525	6
Forsyth v. Hammond, (1897) 166 U.S. 506	7
Gardner v. Panama Railroad Co., (1951) 342 U.S. 29	6
General Pictures Co. v. Western Electric Co., (1938) 304 U.S. 175	7
Keller v. Adams-Campbell, (1924) 264 U.S. 314	7
Layne & Co. v. Western Well Works, (1923) 261 U.S. 387	7
Magnum Co. v. Coty, (1923) 262 U.S. 159	7
Meem-Haskins Coal Corp. v. Central Fuel Corp. (CCPA, 1943) 137 F.2d 242	4
National Hockey League v. Metropolitan Hockey Club, (1976) 427 U.S. 639	2, 6
Tyrrell v. District of Columbia, (1917) 243 U.S. 1	7
United States v. Johnston, (1925) 268 U.S. 220	7
United States v. Rimer, (1911) 220 U.S. 547	7

OTHER AUTHORITIES CITED

Supreme Court Rule 17	7
Civil Rule 37	2, 6

OPINIONS BELOW

The Opinion of the Court of Appeals for the Third Circuit is now reported at 680 F.2d 1040. References herein to the appendix to the petition will be by page (thus, . . .a).

JURISDICTION

Respondent admits jurisdiction.

REPONDENT'S GROUNDS OF OPPOSITION TO THE PETITION

(1) This is an action which is in an interlocutory stage charging trademark infringement, unfair competition, and false designation of origin. The case presents no issue of public importance which should be settled by this court. The district court dismissed the complaint and barred all future relief on the grounds of laches. The court of appeals, after reviewing the entire record, found that there is no evidence that respondent ever abandoned its name or trademarks to the public, and no evidence that petitioner ever relied to its detriment on acquiescence or inaction by respondent, 686 F.2d at 1045, 1047, 10a, 15a. The court of appeals therefore reversed the judgment of the district court insofar as the judgment barred respondent from injunctive relief against future infringement and remanded the case to the district court for further proceedings, 686 F.2d at 1049, 17a.

(2) The petition erroneously asserts that the decision herein is in conflict with this court's decision in *National Hockey League v. Metropolitan Hockey Club*, (1976) 427 U.S. 639. That contention misstates the holding and *ratio* of the decision by the court of appeals. In *National Hockey League* there had been a continuing failure or refusal to comply with discovery orders which was held to exemplify "flagrant bad faith". The complaint was dismissed pursuant to Civil Rule 37 as the ultimate sanction for non-compliance. This action does not present any issue of sanctions or failure to comply with the civil rules. Instead, the district court dismissed the complaint on the merits based on a holding of laches. The court of appeals, after a review of the findings of fact, held that the findings do not support the district court's holding of laches. Accordingly, the court of ap-

peals reversed and remanded the action for further proceedings before the district court, 686 F.2d at 1041, 2a.

(3) The court of appeals did not ignore the findings or the record as is asserted in the petition. To the contrary, the court of appeals gave detailed consideration to the findings and reviewed them in the light most favorable to the petitioner, 686 F.2d at 1045, 10a.

COUNTERSTATEMENT OF THE CASE

Petitioner's statement is so deficient as to require enlargement and correction in important particulars.

(1) Respondent, the University of Pittsburgh, was founded in 1787 and adopted its present name in 1908. Respondent has acquired and enjoyed an outstanding reputation throughout and beyond the United States for many years. "University of Pittsburgh" and "Pitt" have become synonymous, and respondent will generally be called "Pitt" herein. Shortly after Pitt changed its name it adopted the panther as a mascot. Pitt's athletic teams are widely known as the "Pitt Panthers" or the "Panthers", 529 F.Supp. at 466, 19-20a.

(2) Pitt's athletic teams have borne the marks "University of Pittsburgh" and "Pitt" on their uniforms for more than 50 years. Since at least World War II Pitt has sold articles of clothing ("soft goods") and other goods bearing the marks "University of Pittsburgh", "Pitt" and "Pitt Panthers", along with pictorial representations of a panther and the university's seal, 529 F.Supp. at 466, 20a, App. 74, 251-52, 634-53. Pitt's use of soft goods bearing the word "Pitt" predates the establishment of Champion as a corporation, 529 F.Supp. at 469, 25a. Pitt's sale of soft goods bearing its name and marks has continued up to the present time.

(3) Pitt has never abandoned or surrendered its right to control its own name and marks, 686 F.2d at 1045, 10a. In 1961, Pitt registered its mark as used on its class ring. More recently it has obtained a wide variety of Pennsylvania trademark registrations, including eight registrations for clothing, 686 F.2d at 1043, 4a.

(4) In or about 1936, Champion began to supply athletic uniforms to Pitt as well as soft goods which were sold by Pitt in its bookstore, 686 F.2d at 1043, 4a. The district court found, that the arrangement continued until about 1960 when Pitt discontinued carrying such goods in its bookstore, 529 F.Supp. at 467, 22-23a, Findings 15, 18. Finding 18 is based upon testimony reaching back over 20 years uncorroborated by any document. The finding refers solely to Pitt's bookstore on its *main* campus. It is undisputed that even after 1960 Champion continued to supply soft goods bearing Pitt's name and marks to the bookstores at Pitt's branch campuses from which students transferred to the main campus.

(5) The petition erroneously asserts that Pitt delayed for 45 years in asserting its rights against Champion. Even on the most exuberant view of the evidence Champion, for many years, manufactured soft goods bearing Pitt's name and marks solely to fill orders from Pitt's athletic department and book store. In filling Pitt's orders for soft goods Champion did not act adversely to Pitt and did not acquire any right of its own to use Pitt's name and marks, *Meem-Haskins Coal Corp. v. Central Fuel Corp.*, (C.C.P.A., 1943) 137 F.2d 242, 246.

(6) Champion's initial manufacture of goods bearing Pitt's name and marks was to fill orders from Pitt for athletic uniforms. Some ten years later, without notice to Pitt, Champion apparently began selling such goods to

others. At all times when Champion was selling soft goods bearing Pitt's name and marks, a substantial part of its production was sold directly to Pitt. Although Champion keeps records which enable it to determine the quantity of goods which it has sold bearing the names and marks of numerous organizations other than Pitt, Champion swore that it had no records which show any quantity of soft goods which it sold with Pitt's name and marks. There is no evidence of any kind to show what quantity of goods Champion may have sold to others bearing Pitt's name and marks.

(7) At all times Champion knew of Pitt's continuing use of its name and marks. Champion has never claimed that it used Pitt's name and marks as trademarks of Champion. Witnesses for Champion continuously used the word "Pitt" in their testimony to refer to respondent, the University of Pittsburgh. Champion places the Pitt marks on its shirts to show an association with Pitt and because it considers use of the Pitt marks on the goods is attractive to the buyer.

(8) The district court held that Pitt was barred by laches from recovering any damages for past infringement by Champion, and the court of appeals affirmed that holding. The district court did not find that Pitt had any knowledge of the existence or volume of unauthorized sales outside the Pittsburgh area before the 1977 Sugar Bowl game, 686 F.2d 1046, 10a, and there is no evidence that Pitt was ever aware of any substantial sales by Champion for any long period prior to this action. When Pitt became aware of the problem it objected, and this litigation followed.

(9) There is no evidence that the success or failure of Champion's business is dependent upon its use of Pitt's name and marks. To the contrary, Champion sells

soft goods bearing the names and marks of more than 10,000 different schools. The silk screen printing plates which are used to print the names and marks on the soft goods can only be used to print not more than 3 or 4 dozen shirts. The screens are destroyed after each production run, and new screens must be prepared for subsequent runs, 686 F.2d at 1048, 15a. The remaining equipment in Champion's plant can be used to print whatever designs Champion chooses, and Champion would not be precluded from using that equipment by the relief sought herein by Pitt.

I. The Court of Appeals Correctly Decided The Issue Before It.

The petition argues that the decision of the court of appeals herein is contrary to this court's decisions in *National Hockey League v. Metropolitan Hockey Club*, (1976) 427 U.S. 639, in *Czaplicki v. The Hoegh Silvercloud*, (1956) 351 U.S. 525, and in *Gardner v. Panama Railroad Co.*, (1951) 342 U.S. 29. The argument is unsound; the decision here is not in conflict with those decisions. Here, the court of appeals, after reviewing the record and findings, held that there was insufficient evidence to support the holding of laches which would bar all future relief. In *National Hockey League* this court, after reviewing the findings and record, held that there was sufficient ground to support the ultimate sanction under Rule 37 of dismissal of the Complaint.

Czaplicki and *Gardner* fully support the decision of the court of appeals in this action. In each of these cases the district court dismissed the complaint on the ground of laches and the court of appeals affirmed. In each case this court, after a review of the findings and the record, held that dismissal of the complaint was inappropriate. In each case this court noted that "where no prejudice to

the defendant has ensued from the mere passage of time, there should be no bar to relief" 342 U.S. at 31 and 351 U.S. at 533. Here the court of appeals found that Champion had not been prejudiced by the delay. Accordingly, it properly reversed the judgment of the district court which dismissed the complaint and barred Pitt from having future relief.

II. There Is Nothing About This Case Which Calls For Review By This Court.

The judgment of the court of appeals remands this case to the district court for further proceedings, 686 F.2d at 1049, 17a. Accordingly, the case is in an interlocutory stage awaiting further proceedings in the district court. It is clear on the basis of the foregoing that (i) the court of appeals decision is based on a careful review of the record and a reading of all findings in the light most favorable to Champion, and (2) the case does not come within the purview of Rule 17.

No principle, the settlement of which is of importance to the public, is involved. *Forsyth v. Hammond*, (1897) 166 U.S. 506, 513-4; *United States v. Rimer*, (1911) 220 U.S. 547, 548; *Layne & Co. v. Western Well Works*, (1923) 261 U.S. 387, 393; *Magnum Co. v. Coty*, (1923) 262 U.S. 159, 163.

There is no conflict of circuits or conflict with decisions of this court. *Layne & Co. v. Western Well Works, supra; Keller v. Adams-Campbell*, (1924) 264 U.S. 314, 319-20.

What Champion is really seeking is another review of the evidence and the inferences drawn from it. Such review is not the proper function of this Court. *Tyrrell v. District of Columbia*, (1917) 243 U.S. 1, 6; *Magnum Co. v. Coty, supra; United States v. Johnston*, (1925) 268 U.S.

220, 227; *General Pictures Co. v. Western Electric Co.*, (1938) 304 U.S. 175, 179.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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